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## Article

# Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community

Megan M. Carpenter<sup>†</sup>

*The definition and scope of intellectual property and associated laws are under intense debate in the emerging discourse surrounding intellectual property and human rights. These debates primarily arise within the context of indigenous peoples' rights to protection and ownership of culturally specific properties. It is true that intellectual property laws are based on Western, developed markets, Western concepts of creation and invention, and Western concepts of ownership. But whatever their origins, those laws have been, and currently are, the primary vehicle for the protection of artistic, literary, and scientific works worldwide. To segregate indigenous interests from this international legal regime, particularly in light of the increasing globalization of markets, is to deny indigenous peoples both a powerful legal shield and a powerful legal sword. This Article argues that copyright laws can, and must, be expanded so as to maintain the vitality of, and protect, the creative artistic and literary works of indigenous cultures. The Article proposes three major changes to international copyright law: the incorporation of collective and communal notions of authorship, the expansion of the originality requirement to*

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*reflect these forms of authorship, and the application of limits on the duration of copyright protection in a broader community context. The Article further proposes that a variety of intellectual property mechanisms be drawn upon to provide special protection for "sacred" cultural works.*

## I. INTRODUCTION

*[A]uthorship may reside in pre-human creator ancestors, such as the Wandjina of the Kimberley region. Authorship is replaced by a concept of interpretation through initiation. Ownership yields to a concept of custodianship of dreamings, or legends. Alienation, is contradicted by the concept of immutable communal property. Exploitation, is subject to cultural restraints and taboos. Incentivization also has to yield to concerns about spiritual adulteration.<sup>1</sup>*

Intellectual property and human rights make strange bedfellows. Or, at least, so one would have thought until recently. Within a context of globalization and the increasing commodification of content, intellectual property and human rights are interacting in a variety of fora in unexpected ways. The definition and scope of intellectual property and associated laws are under intense debate in the emerging discourse surrounding intellectual property and human rights. These debates primarily arise within the context of indigenous peoples'<sup>2</sup> rights to protection and ownership of culturally specific "properties,"<sup>3</sup> including arts, sacred works and knowledge, biocultural knowledge, ethnobiological knowledge, and cultural expressions. Participants in the ongoing theoretical debates decidedly differ over whether intellectual property rights are the appropriate mechanism by which such cultural works or embodiments should be protected. Some authors argue for a new legal regime specifically designed for indigenous peoples to protect and benefit from the expressions, knowledge, and works of their culture.<sup>4</sup> Others argue

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1 Michael Blakeney, *Intellectual Property in the Dreamtime – Protecting the Cultural Creativity of Indigenous Peoples*, Oxford Intell. Prop. Res. Center, Research Seminar, Pt 1 (Nov. 9, 1999), <http://www.oiprc.ox.ac.uk/EJWP1199.html>.

2 Not surprisingly, the definition of indigenous peoples is itself a subject of debate. For the purposes of this article, I adopt the generally accepted definition of Dr. Martinez Cobo, which describes indigenous peoples as "those which, having historical continuity with pre-invasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories or parts of them." *Id.* at Pt 1(c) (quoting Study of the Problem of Discrimination Against Indigenous Populations, E/CN.4/Sub.2/1986/7).

3 See generally Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996).

4 See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (Fall 1997) see also Craig D. Jacoby & Charles Weiss, *Recognizing Property Rights in Traditional Biocultural Contribution*, 16 STAN. ENVTL. L. J. 74

that property laws themselves should be sufficient.<sup>5</sup> Still others argue that natural resource laws can serve as a vehicle for the protection of cultural properties from exploitation by third parties.<sup>6</sup> Problems commonly outlined by these authors are significant, and dislodge some of the rooted legal operatives of intellectual property laws.<sup>7</sup>

However, if one deals with intellectual property exclusively as a subject matter, rather than a bundle of specific legal operatives established in international and domestic legal systems, the inclusion of indigenous peoples' cultural and scientific knowledge, expressions and artistic and literary works fits squarely within that realm. It is true that intellectual property laws are based on Western, developed markets, Western concepts of creation and invention, and Western concepts of ownership (as evidenced even by the use of the term "intellectual properties").<sup>8</sup> But whatever their origins, the fact remains that those laws have been, and currently are, the primary vehicle for the protection of artistic, literary, and scientific works worldwide. To segregate indigenous interests from this international legal regime, particularly in light of increasing globalization of markets and commodification of content, is to deny indigenous peoples both a powerful legal shield and a powerful legal sword. It is essential that, when found inadequate or inapposite, intellectual property laws are not discarded, but rather adapted to accommodate indigenous situations.

The intellectual property legal regime is a powerful one, its component parts comprising a complex body of law, an existing mind share, and a cache—all of which have developed over the years, and from which all peoples should benefit. Thus, if the workings of the intellectual property machine involve culturally-specific components, that machine should not be discarded when it is found ineffectual for all cultures; rather, the machine should be reconstructed such that it works for all cultures. The inclusion of indigenous peoples' cultural knowledge, inventions, expressions, and works within an intellectual property regime requires some rewiring of the parts, but does not diminish the potential legal value of the machine itself. This Article discusses the means by which indigenous interests can, and should, be incorporated into intellectual property law.<sup>9</sup>

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(1997).

5 See Michael J. Huft, *Indigenous Peoples and Drug Discovery Research: A Question of Intellectual Property Rights*, 89 NW. U. L. REV. 1678, 1679 (citing Roger A. Sedjo, *Property Rights, Genetic Resources, and Biotechnological Change*, 35 J. L. & ECON. 199 (1992)) (discussing property theory as one of several approaches toward protection of indigenous medicines).

6 See *id.*

7 Also striking is the degree of success that other types of groups—with far less quantifiable history, cultural development, or identification with the group on multiple levels (including language, art, religion, and customary law), but with far more financial capital—have had at asserting intellectual property rights within the current legal system in the United States. See, e.g., *Religious Technology Ctr. v. Netcom On-Line Communication Servs.*, 907 F.Supp. 1361, 1375 (N. D. Cal. 1995); *Church of Scientology Int'l v. Fishman*, 35 F.3d 570 (9th Cir. 1994); *Church of Scientology Int'l v. Elmira Mission of Church of Scientology*, 794 F.2d 38, 43 (2d Cir. 1986).

8 See Aoki, *supra* note 3.

9 In this article I have chosen not to explore patent-related indigenous issues. While such

Copyright laws, in their current formulation, are inadequate to protect the fruits of human creativity of indigenous peoples. Thus, I will argue that copyright laws can, and must, be expanded in three ways so as to protect and maintain the vitality of the artistic and literary works of indigenous cultures: incorporating collective and communal authorship; expanding originality requirements to reflect collective and communal authorship; and applying limits on the duration of protection in a broader community context. I also propose that a variety of intellectual property mechanisms be drawn upon to provide special protection for "sacred" cultural works. In Part One, I use the debates over terminology to illuminate briefly some of the cultural issues at play with respect to the protection of the literary, artistic, and scientific works of indigenous peoples. In Part Two, I discuss the parameters of "intellectual property" and introduce the concept and operation of copyrights. In Part Three, I argue that the legal construction of authorship within the copyright context must be expanded to accommodate indigenous interests. In this Section, I examine in detail notions of authorship as they are embedded in intellectual property law and show that they run contrary to fundamental principles of authorship held by indigenous peoples. I argue that authorship must be reconstructed to accommodate cultural difference. I discuss developments toward that end in Australian case law and suggest additional intellectual property concepts that can be drawn upon to further that objective. In Part Four, I address the need to recast originality requirements to reflect an expanded notion of authorship, and in Part Five, I explore the various alternatives to basing the duration of rights on the "life of the author" within this expanded framework, noting both practical and policy conflicts over the duration of rights. Finally, in Part Six, I advocate special protection for sacred cultural works, and explore some of the already established legal mechanisms, in addition to copyright, through which this protection can be sought.

## II. TERMINOLOGY AND CULTURAL ISSUES SURROUNDING THE PROTECTION OF LITERARY, ARTISTIC, AND SCIENTIFIC WORKS OF INDIGENOUS PEOPLES

Indigenous peoples have a variety of reasons for seeking protection of their traditional knowledge, including the conservation of traditional knowledge, protection against commercial exploitation, attribution, and benefit-sharing.<sup>10</sup> Their motives may arise from concern over

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issues are timely, they are also complex, and an adequate explication of those issues is beyond the scope of this article.

For further information, see Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOB. LEGAL STUD. 59 (Fall 1998); Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, Address Before the Ninety-Fifth Annual Meeting of the American Society of International Law (April 4-7, 2001), in 95 AM. SOC'Y INT'L L. PROC. 143 (2001); Huft, *supra* note 5; and Laurie Anne Whitt, *Indigenous Peoples, Intellectual Property, and the New Imperial Science*, 23 OKLA. CITY U. L. REV. 211 (1998).

10 Of course, there are larger issues implicated as well, issues which are outside the scope

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misappropriation, the preservation of biodiversity, promotion of the use of traditional knowledge for development, or external pressures exerted upon the groups.<sup>11</sup> The protection of this knowledge may be sought from within and without intellectual property legal regimes; that is, indigenous peoples may look to existing intellectual property structures for protection, and may also advocate the development of *sui generis* forms of protection for their traditional knowledge. Differing objectives have led, in turn, to distinct methods of casting the terms of the debate.

There has been an active debate regarding the proper terminology for the cultural properties and expressions of indigenous peoples since the mid 1980s, when the World Intellectual Property Organization ("WIPO"), and the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") brought together a Group of Experts on the Protection of Expressions of Folklore by Intellectual Property.<sup>12</sup> Until this time, the products of the intellectual labor of indigenous peoples fell under the rubric of "folklore."<sup>13</sup> At this meeting, some representatives asserted that the term "folklore" had the negative connotation of being associated with lower or superseded civilizations.<sup>14</sup> WIPO and UNESCO responded by providing a definition of the term,<sup>15</sup> which persisted until the World Forum on the Protection of Folklore in 1997.<sup>16</sup> The debate over terminology that occurred at this Forum illuminates some of the cultural issues surrounding copyright protection, including communal authorship and the need to recognize the ongoing vitality of indigenous works.

At the Forum, many delegates raised issues related to the inadequacy of the term "folklore." Some representatives continued to assert that the term was commonly understood to cover static, antiquated traditions meant to be collected and preserved, rather than dynamic, living traditions.<sup>17</sup> An African delegate noted that the term had distinct interpretations in different regions. For instance, the African conception of "folklore" was broad, encompassing all aspects of cultural heritage,

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of this article but which merit mention, such as the specific political, social, and economic positions of particular indigenous groups and their access to land they have traditionally inhabited.

11 COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: EXECUTIVE SUMMARY 10 (London 2002).

12 Blakeney, *supra* note 1.

13 *Id.*

14 *Id.*

15 The definition provided of folklore is a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Its forms include, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture, and other arts. Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985), <http://users.ox.ac.uk/~wgtrr/modprovs.htm>.

16 This Forum was held in February 1996 following the recommendations of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention, and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and the Producers of Phonograms.

17 Blakeney, *supra* note 1, at 2.

including scientific knowledge,<sup>18</sup> while the western conception of “folklore” typically focused on artistic, literary, and performing works. Aboriginal Australian representatives at the Forum supported the notion that “folklore” was too narrowly defined and implied an inferiority of the indigenous culture. They proposed the term “Indigenous Cultural and Intellectual Property,” initially suggested by Ms. Erica Daes, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.<sup>19</sup>

In the years since, the term Traditional Knowledge has replaced Folklore, shifting somewhat the parameters of discourse. Traditional Knowledge encompasses the broad range of indigenous peoples’ cultural heritage, including not only artistic, literary, performing, and associated works, but also the traditional knowledge derived from plants and animals in medical treatment and foodstuffs.<sup>20</sup> Traditional Knowledge, therefore, falls under patent law and biodiversity rights, as well as copyright law. Commentators have claimed that the use of the term Traditional Knowledge signifies a move toward separating indigenous works from other subjects of intellectual property, and, by extension, toward *sui generis* solutions to the protection of the cultural properties and expressions of indigenous peoples.<sup>21</sup> Whether intellectual property law, *sui generis* solutions, or some combination of the two is applied to protect indigenous heritage, developing a vocabulary that is both culturally broad and compatible with the dynamic, evolving culture of indigenous peoples has been recognized as an essential step. As Traditional Knowledge appears to accommodate both concerns, it will be the terminology used in this Article to refer to the general products of indigenous heritage. When explicating the specific products affected by copyright laws, however, for the sake of clarity, I will instead use precise legal terms of art.

### III. INTELLECTUAL PROPERTY IS THE FRUIT OF HUMAN CREATIVITY AND INVENTION

Intellectual property is a “creation of the mind.”<sup>22</sup> It shares many characteristics of real and personal property, in that it is generally considered to be an asset, and as such can be bought, sold, licensed, exchanged, or given away. Furthermore, the intellectual property rights-holder has the ability to prevent its unauthorized use or sale. The most salient difference between intellectual property and other forms of property, however, is that intellectual property is intangible in nature; that

<sup>18</sup> See, e.g., Ghana, Copyright Law of 1985, par. 2 (enacted Mar. 21, 1985), <http://www.unesco.org/culture/copy/copyright/ghana/page1.html#5>.

<sup>19</sup> Blakeney, *supra* note 1, at 2.

<sup>20</sup> As Daes notes, subdividing the heritage of the indigenous people implies “giving different levels of protection to different elements of heritage.” T. Simpson, INDIGENOUS HERITAGE AND SELF-DETERMINATION, IWGIA Document 86, 55 (1997).

<sup>21</sup> Blakeney, *supra* note 1, at 2-3.

<sup>22</sup> WIPO, ABOUT INTELLECTUAL PROPERTY, at <http://www.wipo.int/about-ip/en/overview.html> (last visited Mar. 24, 2004).

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is, it cannot generally be identified by its own physicality. According to WIPO, intellectual property is divided into two categories: industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and copyright, which includes literary and artistic works such as novels, poems, plays, films, musical works, software, drawings, paintings, photographs, sculptures, and architectural designs.<sup>23</sup> "Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs."<sup>24</sup> Intellectual property may include a certain shade of color (such as the use of brown as a trademark for the United Parcel Service),<sup>25</sup> a place of origin (such as geographical indications for Champagne<sup>26</sup> or Gorgonzola),<sup>27</sup> or a shape (such as design patent protection for the Coca-Cola bottle).<sup>28</sup> There are intellectual property implications for plant varieties,<sup>29</sup> sacred religious and cultural knowledge,<sup>30</sup> and genetic resources.<sup>31</sup> Intellectual property is found on coffee tables, walls, and in cupboards; in cars, pharmacies, and the outdoors; on t-shirts, signs, and inside refrigerators.<sup>32</sup> Simply put, intellectual property is the fruit of human creativity and invention.

## A. Copyrights Are Intended to Encourage and Protect Artistic Works

Copyright is a form of legal protection provided to the authors of "original works of authorship."<sup>33</sup> Copyrights protect literary and artistic works, both published and unpublished, provided they are fixed in a tangible or material form. Copyright protection begins when the work is created; that is, no registration is necessary to establish copyrights in a

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> U.S. Trademark Ser. No. 76408109 (filed June 20, 2002), at <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=76408109>.

<sup>26</sup> "Champagne" is protected as a geographical indication in Europe because it refers to a specific wine-producing region of France. In other markets, such as the United States, the term is viewed as being descriptive. See Australian Department of Foreign Affairs and Trade, *What Does TRIPS Say About the Protection [sic] Geographical Indications?*, at [http://www.dfat.gov.au/ip/geo\\_ind\\_trips.html](http://www.dfat.gov.au/ip/geo_ind_trips.html) (last modified Sept. 17, 2002).

<sup>27</sup> For an interesting discussion of geographical source indications in the world of cheeses, see *Geographical Indications*, PTC Forum: Online Journal of the Patent, Trademark & Copyright Research Foundation, at <http://www.ptcforum.org/EDITORIAL%2010006.htm> (Jan. 30, 2002).

<sup>28</sup> U.S. Trademark Reg. No. 1057884 (registered Feb. 1, 1977), at <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=73088384>.

<sup>29</sup> See generally, Whitt, *supra* note 9; Jacoby & Weiss, *supra* note 4.

<sup>30</sup> See generally, Lucy M. Moran, *Intellectual Property Law Protection for Traditional and Sacred "Folklife Expressions"—Will Remedies Become Available to Cultural Authors and Communities?*, 6 U. BALT. INTELL. PROP. L. J. 99 (1998); Farley, *supra* note 4.

<sup>31</sup> See generally Whitt, *supra* note 9; Jacoby & Weiss, *supra* note 4.

<sup>32</sup> WIPO, AT HOME WITH INVENTION, at <http://www.wipo.int/about-ip/en/athome.htm> (last visited Mar. 10, 2004).

<sup>33</sup> 17 U.S.C. § 102 (1994).



work, and copyright laws grant the creator the exclusive right to reproduce, distribute, perform and display the work publicly, as well as to prepare derivative works.<sup>34</sup>

Under copyright law, the creator of the original expression in a work is its actual author. The author is also the owner of copyright unless there is a written agreement by which the author assigns the copyright to another person or entity. In the case of a work made for hire, authorship is attributed to the employer or the contracting party. Authorship is an integral operative of copyright laws.

Authorship is particularly relevant in an additional way: copyrights last for a limited duration, using as their basis the life of the author. These limits on the duration of protection are mandated by the Berne Convention,<sup>35</sup> as well as some national laws, such as Article 1 of the United States Constitution.<sup>36</sup> Other national laws that provide protection for literary and artistic works of indigenous peoples imply perpetual protection for these works, and still others, such as those of Sri Lanka, Ghana, and the Congo explicitly provide it.<sup>37</sup>

#### IV. LEGAL CONSTRUCTS OF AUTHORSHIP MUST ACCOMMODATE CULTURAL DIFFERENCE

Authorship in the context of copyright laws has its grounding in Romantic Individualism, which can run directly contrary to authorship as it is conceived of by indigenous peoples. It is absolutely essential that intellectual property laws recognize these differences in cultural values and societal norms and evolve to accommodate these distinctions.

##### A. The Construct of Authorship Under Traditional Intellectual Property Law Is Steeped in the Cultural Notion of Romantic Individualism

In order to gain a full understanding of authorship under copyright laws it is worthwhile to trace its history and development. The genesis of modern copyright law is often considered to be the 1709 Statute of Anne, which had as its stated goal to encourage "learned Men to compose and write useful Books."<sup>38</sup> This statute, in practice, served more as a benefit to publishers than writers, in so far as it codified trade regulation practices of the London guild of printers and booksellers that controlled the book trade

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<sup>34</sup> 17 U.S.C. § 106 (1994).

<sup>35</sup> Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971 (date of most recent revision).

<sup>36</sup> U.S. CONST. art. I, § 8 provides: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

<sup>37</sup> See Moran, *supra* note 30, at 103.

<sup>38</sup> Statute of Anne, 1709, c. 19 (Eng.).

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in the United Kingdom.<sup>39</sup> Underlying the enactment of this statute was the increasingly widespread mechanical reproduction of text and a perceived need for accountability for written works.<sup>40</sup>

Over the course of the eighteenth century, however, with the rise of the Romantic author, the law shifted from a publishers' copyright to an authors' copyright. Under the ethos of Romanticism, literature began to be seen as the product of an individual's private thoughts rather than the transference of ideas that were already in the public domain.<sup>41</sup> Before the Romantic period, notions of authorship were less focused on the individual. In classical Greece, for example, authors had been conceptualized as mere vessels receiving gifts of art and literature from the nine muses. Thus, Plato and Aristotle viewed themselves not as creators of text, but as artisans. Even in Shakespeare's time, dialogue and plot lines were borrowed freely without attribution to their original source.<sup>42</sup> It wasn't until the literary accounts of Romantic authorship by Young, Kant, Fichte, Wordsworth, Keats and their contemporaries that authorship was attributed to an original creator whose work "rose spontaneously from his living being."<sup>43</sup> Keats wrote, "I never wrote one single Line of Poetry with the least Shadow of Public thought."<sup>44</sup> As authors began to be regarded as creators rather than producers, inspiration was seen as emanating from within the writer, and the "work was made peculiarly and distinctively the product—and the property—of the writer."<sup>45</sup>

At the beginning of the eighteenth century, copyright law existed to protect publishers' rights, not authors' rights. However, with industrialization came mass production and a commodification of culture.<sup>46</sup> In the context of the Enlightenment, a new group of individuals emerged, individuals who wanted to earn their livelihood from the sale of their writings.<sup>47</sup> An increasingly literate public began to respect writing as a profession, and saw the writer as an originator of works; a writer was no longer part of the assembly line of publication, but rather a creator of text.<sup>48</sup> This Romantic idea of seeing the writer as an originator of text informs the current legal discussions of copyright. In the *Trade-Mark Cases*, the U.S.

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39 See Mark Rose, *The Author in Court: Pope v. Curll (1741)*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 211, 213 (Martha Woodmansee & Peter Jaszi eds., 1994).

40 See Rowland Lorimer, *Intellectual Property, Moral Rights, and Trading Regimes*, 21 CAN. J. COMM. 267, 272 (1996).

41 See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425, 434 (1984).

42 Lorimer, *supra* note 40, at 271.

43 Lorimer, *supra* note 40, at 272.

44 Letter by John Keats, in *LETTERS OF JOHN KEATS: TO HIS FAMILY AND FRIENDS* at 96 (Sidney Colvin ed.) (1935).

45 Woodmansee, *supra* note 41, at 427.

46 See Jacqueline Rhodes, *Copyright, Authorship, and the Professional Writer: The Case of William Wordsworth*, CARDIFF CORVEY: READING THE ROMANTIC TEXT, Issue 8 (June 2002), [http://www.cf.ac.uk/encap/corvey/articles/cc08\\_n01.html](http://www.cf.ac.uk/encap/corvey/articles/cc08_n01.html).

47 See Woodmansee, *supra* note 41, at 426.

48 See Rhodes, *supra* note 46, at 3-4.

Supreme Court ruled that compilations of data, for example, could not be copyrighted unless they showed "some minimal degree of creativity," as copyrightable works "are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like."<sup>49</sup> In *Campbell v. Acuff-Rose Music*, the United States Supreme Court held that parody can constitute fair use provided the original material is "transformed." Thus, an author's creativity serves as an affirmative defense against a charge of copyright infringement: "[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."<sup>50</sup>

#### B. Conceptions of Authorship in Indigenous Communities Differ Widely from Those Typically Embodied in Intellectual Property Laws

In *Milpurrruru v. Indofurn Ltd.*,<sup>51</sup> the High Court of Australia awarded damages to plaintiffs whose copyrights in sacred works were infringed by an outside organization that reproduced those designs onto carpets. This case will be discussed in greater detail in the next Section. In the meantime, the story of one artist involved in that suit provides an illustrative introduction to indigenous conceptions of authorship.

Banduk Marika is a member of the Yolngu Clan who was given the right to use the imagery of her creators by the traditional owners of the clan. Under Aboriginal law, underlying cultural images belong to the clan communally, while the right to create artworks and use pre-existing designs of the clan resides with the traditional owners, who are considered to be custodians of the images.<sup>52</sup> These traditional owners may determine whether cultural images may be used in artwork, who may create such work, and the terms of its reproduction.<sup>53</sup> Malawan, the senior representative of the Rirratjingu clan, gave Ms. Marika permission to depict part of the mythology of the Djang'Kawu creation story, which is of great importance to her clan.<sup>54</sup> In her work, she depicted the story of Djanda<sup>55</sup> and the Sacred Waterhole, a creation story in which the creator Djang'Kawu and his two sisters, the Wagilag sisters, traveled from

<sup>49</sup> Trade-Mark Cases, 100 U.S. 82, 94 (1879).

<sup>50</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 570 (1994).

<sup>51</sup> *Milpurrruru v. Indofurn Ltd.* (1994) 130 A.L.R. 659 (Austl.) [hereinafter *M. & Others*, in accordance with traditional Aboriginal custom against speaking the names of the dead].

<sup>52</sup> *Id.* at 663; World Intellectual Property Organization (WIPO), Case Study 1, 9 at [www.wipo.org/tk/en/studies/cultural/minding-culture/studies/carpetscase.pdf](http://www.wipo.org/tk/en/studies/cultural/minding-culture/studies/carpetscase.pdf).

<sup>53</sup> *M. & Others*, *supra* note 51, at 663; WIPO, Case Study 1, *supra* note 52.

<sup>54</sup> *M. & Others*, *supra* note 51, at 663. Banduk Marika is the daughter of Mawalan, who was the leader of the Rirratjingu clan until his death in 1967. WIPO, Case Study 1, *supra* note 52, at 4.

<sup>55</sup> Djanda is part of a larger story, which cannot be generally disclosed. WIPO, Case Study 1, *supra* note 52, at 6.

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Burralku to Yelangbara.<sup>56</sup> This work was included in an educational portfolio produced by the Australian National Gallery ('ANG') in 1988, which was meant to serve as an educational resource of the best Aboriginal artworks in the ANG.<sup>57</sup> In 1992, she discovered that a Vietnamese carpet company had appropriated the portfolio and reproduced several Aboriginal works from it, including hers, onto woolen carpets.<sup>58</sup>

Since such reproduction was in opposition to the cultural use of the imagery, the consequences for Ms. Marika were potentially grievous. Under Aboriginal law, if permission has been given by the traditional owners to a particular artist to create a work, and that work is later inappropriately reproduced by others, the artist is held responsible for the breach, even where the artist had no knowledge of, or control over, the infringement.<sup>59</sup> She explained, "As an artist, whilst I may own copyright under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu."<sup>60</sup> She explained that, in fact, she could have been subject to a variety of sanctions if her family had found out, from expulsion from the clan to being prevented from creating more art.<sup>61</sup> The possibility of spearing was noted as a possible sanction by the court in serious cases of infringement.<sup>62</sup>

Another authorship problem is illuminated by the case of the Wandjina, the Creation Ancestors of the Kimberley Aborigines. Their

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56 *M. & Others*, *supra* note 51, at 662:

[Creation stories and dreaming stories] are represented in ceremonies of deep significance, and are often secret or sacred, known only to a few senior members of the clan chosen according to age, descentence, sex, initiation, experience in the learning of the dreamings and ceremonies, and the attainment of skills which permit the faithful reproduction of the stories in accordance with Aboriginal law and custom. Painting techniques, and the use of totemic and other images and symbols are . . . strictly controlled by Aboriginal law and custom. Artworks are an important means of recording these stories, and for teaching future generations. Accuracy in the portrayal of the story is of great importance. Inaccuracy, or error in the faithful reproduction of an artwork, can cause deep offence to those familiar with the dreaming.

57 *M. & Others*, *supra* note 51, at 661; WIPO, *supra* note 52, at 4.

58 *M. & Others*, *supra* note 51, at 660; *see also* WIPO, *supra* note 52, at 2-4.

59 *M. & Others*, *supra* note 51, at 663.

60 *Id.*

61 *M. & Others*, *supra* note 51, at 663-64; WIPO Case Study 1, *supra* note 52 (citing Banduk Marika, Affidavit, 1994):

Even though I know that I am not responsible for the reproduction I am still concerned about the ramifications for me and my work within Yolngu society, and I greatly fear a loss of reputation arising from Yolngu associating me with the reproduction. I fear that my family and others may accuse me of giving permission for the reproduction behind their backs without consulting and seeking permission in the manner required by our law and culture. I fear that this could result in my family and others deciding that I cannot be trusted to use important images such as this one anymore. This would not only threaten my artistic and economic livelihood, but also my ability to participate fully in Yolngu society and cultural practice.

62 *M. & Others*, *supra* note 51, at 663.

paintings are found in rock galleries in the Kimberley region. It is impossible to determine authorship of these paintings for copyright purposes, since the paintings are ancient, though believed to be done by the Wandjina. According to the Kimberley Aborigines, the images may be retouched or painted today, provided that deference is given to the Creators.<sup>63</sup> If the paintings are not treated appropriately, the Kimberley Aborigines believe that those actions will bring death and devastation.<sup>64</sup> There is, however, no law that would prevent these images from being appropriated and exploited by commercial enterprises. Notably, a design of the Wandjina spirit is now used as a logo for a surfboard company.<sup>65</sup> The exploitation of the Wandjina spirit image is a harm without a remedy. Although these images have great cultural significance to indigenous peoples, the exploitation of the images is not actionable without an identifiable individual author.

The Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities has concluded: [I]ndigenous peoples do not view their heritage as property at all—that is something which has an owner and is used for the purpose of extracting economic benefits—but in terms of community and individual responsibility. Possessing a song, story or other medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.<sup>66</sup>

It is critical that intellectual property laws recognize these differences in cultural values and societal norms, and evolve to accommodate these distinctions. One way this transformation can occur is to recognize communal responsibility over a work through expanded constructions of authorship.

In various legal fora worldwide, courts are beginning to grapple with these issues and incorporate cultural distinctions into legal realities. In the largest body of case law on the subject, Australian courts have begun to address issues of authorship for copyright purposes as Australian Aboriginal peoples seek protection of culturally significant works from exploitation.

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<sup>63</sup> Blakeney, *supra* note 1, at pt. 2, § d.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> E.I. Daes, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45<sup>th</sup> Sess., Agenda Item 14, para. 26 (1993).

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## C. Reconceptualizing Authorship to Accommodate Cultural Difference Is Essential, and Movements Toward that End Are Best Illuminated by Developing Australian Case Law

In Australia, there exists a well-developed legal regime for the protection of intellectual property interests, as well as a vital, influential indigenous Aboriginal culture. This combination has led to a groundbreaking body of case law located at the intersection of indigenous interests and intellectual property. This remainder of this Article, therefore, will focus primarily on the developments in this jurisdiction. While Australian courts have not yet explicitly expanded legal notions of the author for copyright purposes, the growing body of case law seeking the protection of sacred Aboriginal works from exploitation—and the increasing, if spotty, success of those efforts—illuminate the importance of this issue. Furthermore, a growing pattern of creative lawmaking and dicta shows that judges are beginning to recognize the need for such reconfiguration.

## 1. Early Infringement Actions Represent an Attempt by Courts to Apply Intellectual Property Law to the Protection of Aboriginal Artworks

The first case dealing with the unauthorized reproduction of Aboriginal designs was *Foster v. Mountford*,<sup>67</sup> in which the Supreme Court of the Northern Territory estopped the publication of an anthropology text called *Nomads of the Desert*.<sup>68</sup> This text purported to document the life of the Pitjantjatjara People and contained not only matters of deep religious and cultural significance, but also images that were sacred to the Pitjantjatjara People and were forbidden even to uninitiated members of the Pitjantjatjara.<sup>69</sup> Since the designs that were reproduced were tribal secrets and were not to be seen by uninitiated tribe members, the court was able to issue an injunction to suppress publication of the text.<sup>70</sup>

Where the facts do not fit as easily within existing intellectual property law, for example, where the Aboriginal designs would be considered to be in the public domain, the issue becomes more complex.<sup>71</sup> The Australian

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67 *Foster v. Mountford* (1978) (N.T. Supreme Court), 29 F.L.R. 233.

68 For an account of the case, see Blakeney, *supra* note 1, at 8.

69 See Blakeney, *supra* note 1, at 8.

70 See *id.*

71 As Blakeney notes:

Aboriginal Peoples have no right equivalent to those which are conferred under the action of blasphemy. The NIAA (National Indigenous Arts Advocacy Association, Inc.) Report refers to a story used in the television series “Heartlands” which belonged to a Western Australian Aboriginal community, but which was represented as coming from New South Wales. Because the story was in the public domain, the relevant community had no rights to prevent the transmission of this programme. The law does not currently recognize the proprietary interests of

Copyright Act of 1968 establishes a cause of action for artists whose works have been reproduced without authorization.<sup>72</sup> The first well-publicized case brought under the Copyright Act was filed by fourteen Aboriginal artists seeking compensation for the unauthorized reproduction of Aboriginal designs on t-shirts.<sup>73</sup> The case resulted in an injunction against the t-shirt manufacturer and an out-of-court settlement for \$150,000.<sup>74</sup>

## 2. Recent Jurisprudence Has Rejected Communal Title Under the Copyright Act, But Has Considered Aboriginal Customary Law in Assessment of Damages

While recent jurisprudence still prevents Aboriginal groups from asserting communal ownership or filing for damages based upon communal harm, these cases track a gradual, legal recognition of Aboriginal rights, even in situations where that recognition depends in part upon a consideration of traditional and customary law. A recent development in Australian jurisprudence represents a progression toward greater recognition of Aboriginal rights in cultural and artistic works by taking into account traditional Aboriginal customary law when assessing damages for the unauthorized use of Aboriginal works.

While the Australian Copyright Act provides some protection for illicit copying of works owned by individual authors, it recognizes neither a remedy for the unauthorized copying of works held through communal ownership nor compensation for communal harm.<sup>75</sup> The Federal Court explicitly rejected a claim of communal title in sacred images in *Yumbulul v. Reserve Bank of Australia*.<sup>76</sup> In that case, the plaintiffs, representatives of the Galpu Clan, attempted to prevent the reproduction by the Reserve Bank of a design created by a member of the clan.<sup>77</sup> The Bank had issued a commemorative banknote containing a reproduction of a design of a Morning Star Pole done by Terry Yumbulul, who obtained his authority to create this design only through initiation and revelatory ceremonies.<sup>78</sup> Of

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Aboriginal peoples in their Dreamings stories, sacred images, or dances. Blakeney, *supra* note 1.

<sup>72</sup> Copyright Act, 1968, §§ 37-38 (Austl.) (providing a cause of action for both direct and indirect infringement).

<sup>73</sup> *Bulun Bulun v. R & T Textiles Ltd.* (1998), 157 A.L.R. 193 (Austl.) (alternatively paginated version cited, on file with author).

<sup>74</sup> *Id.*

<sup>75</sup> Copyright Act, 1968, §§ 37-38 (Austl.); see also Blakeney, *supra* note 1, at 8.

<sup>76</sup> *Yumbulul v. Reserve Bank of Australia* (1991), 21 I.P.R. 481 (Austl.) (alternatively paginated version cited, on file with author).

<sup>77</sup> *Id.* at 2.

<sup>78</sup> *Id.* One witness in the case testified that the Morning Star Pole is at the heart of a ceremony in which people from different clans come together to commemorate a person who has died. During this ceremony, the Pole is presented to the family of the deceased, and is meant to reinforce the mutual respect between clans. The witness further stated: "The attainment of the right to make such a pole is a matter of great honour, and accordingly, abuses of rights in relation to the careful protection of images on such poles is a subject of great sensitivity." Testimony of Mandawuy Yunupingu, *Id.* at 3.

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particular significance to the court was the fact that Mr. Yumbulul had consented to the Bank's use of the image.<sup>79</sup> Mr. Yumbulul had an undisputed right to make the Morning Star Pole for ceremonial purposes, and also for sale to places such as museums for educational purposes.<sup>80</sup> The plaintiffs argued that the artist had a communal obligation to the clan to prevent the design from being used in a culturally offensive way. The court found, however, that the pole was an original artistic work created by Mr. Yumbulul under the terms of the Copyright Act, and that Mr. Yumbulul assigned his rights to the Reserve Bank under a valid contractual agreement.<sup>81</sup> The court held that the Copyright Act did "not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin."<sup>82</sup>

The next significant judicial development occurred not with regard to Aboriginal intellectual property, but real property. In *Mabo & Ors v. State of Queensland*,<sup>83</sup> the High Court recognized, for the first time, the validity of traditional Aboriginal land law. This holding was considered by some to be revolutionary for its potential application to legal causes particular to Aborigines and Torres Strait Islanders. In the aftermath of this (literally) landmark decision, Aboriginal advocacy groups have been demanding legislation that will acknowledge other aspects of traditional Aboriginal law, including the protection of traditional Aboriginal cultural resources and art from appropriation and exploitation by others.

*M. & Others*,<sup>84</sup> discussed above, was the first post-*Mabo* case to consider the applicability of the Copyright Act to protecting the unauthorized reproduction of Aboriginal designs. In that case, an Australian carpet company had carpets manufactured in Vietnam on which were reproduced the designs of eight Aboriginal artists. The carpet company obtained the designs from a portfolio of artworks produced by prestigious organizations; the works in question were bark paintings depicting spiritually significant legends of peoples from the Central Arnhem Land, in many instances important creation and dreaming stories strictly controlled by Aboriginal law. The paintings were reproduced in nearly identical form and color.<sup>85</sup>

Upon consideration of the facts, the court noted that under Aboriginal law it was the responsibility of the traditional owners to take action to preserve the dreaming and to punish those responsible for the breach, punishments ranging from exclusion from ceremonies and removal of the

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<sup>79</sup> *Id.* at 4-9.

<sup>80</sup> *Id.* at 3.

<sup>81</sup> *Id.* at 9.

<sup>82</sup> *Id.* Following the resolution of this case, Mr. Yumbulul was criticized by the Galpu Clan for violating his cultural obligation to ensure that the pole was not used in a manner offensive to the sacred designs and meanings it symbolized. He later attempted to set aside the copyright assignment on the grounds of unconscionability but was unsuccessful.

<sup>83</sup> *Mabo v. State of Queensland* (1992), 175 C.L.R. 1 (Austl.).

<sup>84</sup> *M. & Others*. (1994), 130 A.L.R. 659 (Austl.).

<sup>85</sup> *Id.* at 662.



privileges to reproduce clan stories to spearing.<sup>86</sup> Under the Copyright Act, damages are typically assessed according to the depreciation in value of the copyright itself. The court acknowledged that the plaintiffs in this case would not suffer a monetary loss as a result of the defendants' infringement, and considered itself unable to compensate for communal harm suffered, as "the statutory remedies do not recognize the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories."<sup>87</sup> Rather, the court awarded damages based upon a less utilized provision of the Copyright Act allowing damages in cases of particularly egregious infringement.<sup>88</sup>

The court's holding in *M. & Others* moves beyond the *Yumbulul* judgment and represents a progression toward greater recognition of Aboriginal rights in cultural and artistic works, in so far as it stands for the proposition that courts may take traditional Aboriginal customary law into account when assessing damages for the unauthorized use of Aboriginal works. However, the court's holdings in both *M. & Others* and *Yumbulul* still prevent Aboriginal groups from asserting communal ownership or filing for damages based upon communal harm.

### 3. A Recent Decision Applies Fiduciary Principles to the Issue of Communal Ownership of Aboriginal Works

The court tackled the question of whether the communal interests of Aboriginal owners in cultural works recognized under traditional law created binding obligations on third persons outside the Aboriginal community under the 1968 Copyright Act in its most recent case on point: *Bulun Bulun & Anor v. R & T Textiles Ltd.*<sup>89</sup> In that case, a Ganalbingu artist filed suit alleging infringement of the copyright in his work "Magpie Geese and Water Lilies at the Waterhole,"<sup>90</sup> which designs had appeared on printed clothing fabric in Australia. Joining him in the suit was a representative of the Ganalbingu people, who claimed that the Ganalbingu people were equitable owners of the copyright in the painting. The court reasoned that the Ganalbingu people could only have equitable rights in the painting if there had been a trust placed upon expressions of ritual knowledge. The court analogized to African tribal communities in which indigenous property was regarded as being held in trust by the head of the

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<sup>86</sup> *Id.* at 663.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* The court invoked *Williams v. Settle*, 1 W.L.R. 1072, 1986-87 (1960), which upheld an award of substantial damages for the sale of wedding photographs of a plaintiff whose father had been murdered in well-known circumstances, where a strictly commercial assessment would have resulted in a minimal level of loss.

<sup>89</sup> *Bulun Bulun & Anor v. R & T Textiles Ltd*, 157 A.L.R. 193 (1998) (alternatively paginated version cited, on file with author).

<sup>90</sup> *Id.* The painting depicted the main totemic well for the artist's clan of the Ganalbingu people, called Djulibinyamurr, and has been described as being the place from which the turtle creator of the Ganalbingu emerged. See also Blakeney, *supra* note 1, at 8-9.

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tribal group. The court found that in this case there was no trust established, because there was neither a manifestation of intent nor a practice on the part of the Ganalbingu people to hold artworks in trust.<sup>91</sup>

The significance of this case lies, however, in its application of fiduciary principles to the issues at hand. The court found that Mr. Bulun Bulun had a fiduciary duty “not to exploit the artistic work in such a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.”<sup>92</sup> As Mr. Bulun Bulun had enforced his copyright, the court dismissed the action brought by the Ganalbingu representative, holding that the rights of the Ganalbingu people were confined to a right *in personam* against the artist to enforce his copyright against third party infringers.<sup>93</sup>

This principle is one that has been used in other countries’ jurisprudence regarding indigenous peoples,<sup>94</sup> but this was a case of first impression with respect to the application of fiduciary principles to indigenous issues in Australia. While the court still failed to recognize equitable communal interest in the copyright itself, it did acknowledge that indigenous peoples could be collective beneficiaries of fiduciary obligations owed to them by a copyright holder.<sup>95</sup>

#### D. Other Possibilities for Expanding the Notion of Authorship Are Inherent in Existing Tenets of Copyright Law

##### 1. Joint Authorship, Transfers of Rights, and Works Made for Hire Provide for the Maintenance of Some Collective Rights

The most logical possibility for attributing group copyrights to indigenous peoples may rest in the notion of joint authorship. However, as currently conceived, joint authorship has a high threshold that may be difficult, if not impossible, for indigenous peoples to meet. Joint authorship allows multiple authors of a work to be co-owners of the copyright in that work, provided that: (1) the joint authors collaborate in fact in the work’s

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<sup>91</sup> *Bulun Bulun*, at 3-4.

<sup>92</sup> *See id.* at 17-20.

<sup>93</sup> *Id.*

<sup>94</sup> Canada, in particular. *See Blakeney*, *supra* note 1.

<sup>95</sup> The court was careful to couch its holding in terms of factual analysis:

The conclusion that in all the circumstances Mr. Bulun Bulun owes fiduciary obligations to the Ganalbingu people does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu people as part of the factual matrix which characterizes the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognizes as giving rise to the fiduciary relationship, and to the obligations which arise out of it.

*Bulun Bulun*, at 19.

preparation; (2) the authors intend, at the time the work is prepared, that their contributions be merged into "inseparable or interdependent parts of a unitary whole;" and (3) each person's contribution is itself copyrightable.<sup>96</sup> Under the principles of joint authorship, then, only those members of the indigenous community who were involved in the creation of a work can be joint authors, and the rest of the community could not be considered rights-holders.

Two other possible areas of existing copyright law within which indigenous people may find sources of collective authorship are found in the provisions for transfers of rights and works made for hire. Transfers of rights occur when an individual artist transfers his or her rights to the community as a corporate entity.<sup>97</sup> To circumvent the possibility of an artist refusing to transfer those rights, the work could be done as a work made for hire. Under United States copyright law, for example, a work made for hire is "a work prepared by an employee within the scope of his or her employment."<sup>98</sup> Under this provision, corporate entities can claim authorship rights to a given work when that work is created as part of an individual's job.<sup>99</sup> However, there may be ethical reasons why indigenous peoples would not want to avail themselves of this provision, either because they do not want to be seen as a corporate entity or because they do not want to characterize the relationship of the community with its members as one of employment.

## 2. United States Courts Have Upheld the Legal Definition of Cultural Patrimony, Which Includes the Concept of Collective Control and/or Ownership

Another legal possibility from which indigenous peoples could benefit is the concept of cultural patrimony. In fact, the Tenth Circuit has upheld a legal definition of cultural patrimony with reference to indigenous peoples in the United States. In *United States v. Corrow*,<sup>100</sup> a defendant convicted of trafficking in cultural patrimony under the Native American Graves Protection and Repatriation Act<sup>101</sup> (NAGPRA) asserted that the definition of cultural patrimony contained therein was void for vagueness "in its multitude of meanings . . . creating easy prey for the untrammelled discretion of law enforcement."<sup>102</sup> Under NAGPRA, cultural patrimony is

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<sup>96</sup> 17 U.S.C. § 201(a) (2000) ("The authors of a joint work are co-owners of copyright in the work."); 17 U.S.C. § 101 (2000) (A joint work is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole").

<sup>97</sup> See generally 17 U.S.C. Ch. 2 (2000); see also U.S. COPYRIGHT OFFICE, Circular 9, [www.copyright.gov/circs/circ09.pdf](http://www.copyright.gov/circs/circ09.pdf).

<sup>98</sup> See generally 17 U.S.C. Ch. 2 (2000).

<sup>99</sup> *Id.*

<sup>100</sup> *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997).

<sup>101</sup> Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 2(D), 104 Stat. 3048 (1990).

<sup>102</sup> *Corrow*, 119 F.3d at 799.

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defined as:

an object having ongoing historical, traditional, or cultural importance central to Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.<sup>103</sup>

In *Corrow*, the defendant had been convicted of transporting Yei B'Chei ceremonial adornments. While Indian authorities did not agree as to whether the adornments were owned by the tribe or by the individual, the Tenth Circuit nonetheless rejected the defendant's argument, stating that "NAGPRA's reach in [protecting sacred cultural items] warrants its aspirational characterization as 'human rights legislation.'"<sup>104</sup> If this concept of cultural patrimony can be applied to copyright doctrine and practice, it could also be an effective vehicle to grant rights regarding the cultural artistic and literary works of indigenous peoples in the United States, and as a model for international legislation codifying collective ownership.

#### V. ORIGINALITY REQUIREMENTS MUST BE MODIFIED TO REFLECT EXPANDED NOTIONS OF AUTHORSHIP, DEFINING ORIGINALITY IN TERMS OF A COMMUNITY RATHER THAN AN INDIVIDUAL

In many copyright systems, including Australia, Canada, and the United States, a work must be original to be eligible for protection. In fact, the U.S. Supreme Court pronounced in a recent case that "[t]he *sine qua non* of copyright is originality."<sup>105</sup> Originality requires that the work be the product of original thought, skill, or labor of the author. The threshold is not a high one; a work satisfies the requirement by evidencing original skill and labor of its creator. Where a work is based upon a preexisting work, for example, it must demonstrate substantial variation.<sup>106</sup>

Some authors argue that this requirement presents problems for the protection of culturally significant artistic and literary works of indigenous peoples, because those works are often by their very nature not innovative, but rather derived from preexisting works in a "slow process of creative development."<sup>107</sup> Farley, for example, recognizes indigenous art's function as a historical and sacred text, and notes that as such, innovation is

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<sup>103</sup> *Id.*

<sup>104</sup> *Corrow*, 119 F.3d at 800.

<sup>105</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991).

<sup>106</sup> Farley, *supra* note 4, at 19.

<sup>107</sup> *Id.* at 21.

restricted and faithful and accurate reproduction is important.<sup>108</sup> While those propositions are certainly accurate, I do not believe that they contraindicate compliance with copyright laws; rather, if we expand the notion of authorship itself, then by extension we are no longer relying upon the originality of one singular creator, but that of a community. If the work is originally produced by the community itself—that is, the communal authors of the work—then it should satisfy the litmus test of originality for copyright purposes.

#### VI. THE DURATION OF COPYRIGHT BASED ON “LIFE OF THE AUTHOR” IN MANY JURISDICTIONS MUST ADEQUATELY PROTECT CULTURAL WORKS OF COMMUNAL AUTHORSHIP

International treaties such as the Berne Convention establish limits for the duration of copyright protection, basing such terms typically on the “life of the author.”<sup>109</sup> The Berne Convention provides: “The term of protection granted by this Convention shall be the life of the author and fifty years after his death.”<sup>110</sup> Domestic laws, such as Article 1, Section 8 of the United States Constitution, also limit the term of intellectual property protection.<sup>111</sup>

These limitations may be practically inapplicable where a literary or artistic work is the work of an indigenous community, and inapposite on a public policy basis where these works need extended protection to support private creative contributions of “usually unknown members of a number of subsequent generations of a community.”<sup>112</sup>

Some authors theorize that perpetual protection of cultural works is incompatible with the basic tenets of intellectual property laws. However, one does not have to look very far to see possible models for legal development within the context of current intellectual property regimes. In the United States, for example, trademarks remain protected as long as they are in use.<sup>113</sup> As Moran argues, “[T]o extend this type of protection to folklife expressions so that they are protected as long as they remain in use in a customary, traditional, or sacred context within the folk community which created them, is incompatible neither with American law in general nor with the current range of intellectual property interests which we

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<sup>108</sup> *Id.*

<sup>109</sup> Berne Convention, *supra* note 35, art. 7; see also U.S. COPYRIGHT OFFICE, CIRCULAR NO. 1 (2000), <http://www.copyright.gov/circs/circ1.html#hlc> (providing copyright protection for the life of the author plus an additional 70, 95, or 120 year term); and 17 U.S.C. §§ 301-305 (2000).

<sup>110</sup> Berne Convention, *supra* note 35, art. 7 (providing that member states can elect to extend this term of protection).

<sup>111</sup> U.S. CONST., art. 1, § 8, cl. 8 (empowering Congress to grant authors and inventors “exclusive Right” to their work “for limited Times”).

<sup>112</sup> WIPO REGIONAL MEETING OF HEADS OF INTELLECTUAL PROPERTY OFFICES OF CARIBBEAN COUNTRIES, WIPO/IPH/POS/97/1(b) (July 16, 1997), at 3.

<sup>113</sup> Trademark Act of 1946, 15 U.S.C. §§ 1058-1059 (1997).

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protect.”<sup>114</sup>

A. The Concept of “Derivative Works” May Inform These Debates Over Duration of Protection for Cultural Works

Alternatively, Moran posits, it is possible to view relevant cultural works as “derivative work” under U.S. copyright law following the end of the initial time limit for protection.<sup>115</sup> A derivative work under copyright law is a work that is based on (or derived from) one or more already existing works, and is copyrightable provided that it includes an “original work of authorship.”<sup>116</sup> Derivative works can include, *inter alia*, translations, musical arrangements, dramatizations, fictionalizations, art reproductions, and condensations. Any work in which the modifications represent, as a whole, an original work of authorship is a “derivative work”; usually derivative works are primarily new works that incorporate previously published material.<sup>117</sup>

Under this scheme, it is possible that new generations of indigenous communities—the “several subsequent generations of a folk community”<sup>118</sup> proposed by Moran—can be viewed as the “new” author of the derivative cultural work. Incorporating cultural works into the discourse of derivations may be a step toward ensuring lasting protection for vital, cultural works.

One significant problem, however, is that to be copyrightable, a derivative work must be different enough from the original to be regarded as a “new work” or must contain a substantial amount of new material. Making minor changes or additions of little substance to a preexisting work will not qualify the work as a new version for copyright purposes.<sup>119</sup> The new material must in itself be original and copyrightable.<sup>120</sup> Therefore, for important cultural works to fall into the realm of derivative works, those works will have to evolve significantly from their original form. While such modification may happen in some instances, it is unlikely that the work will be sufficiently “new” for copyright purposes. In any event, derivative works provide a precedent for extending the duration of protection for copyrighted works and present a starting point for discussions on extending copyright protection for valuable cultural works of ongoing vitality.

B. Public Policy Concerns over Works in the Public Domain and the

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<sup>114</sup> Moran, *supra* note 30, at 115.

<sup>115</sup> *Id.*

<sup>116</sup> See U.S. COPYRIGHT OFFICE, CIRCULAR 14, <http://www.copyright.gov/circs/circ14.html> [hereinafter CIRCULAR 14].

<sup>117</sup> *Id.*

<sup>118</sup> Moran, *supra* note 30, at 115.

<sup>119</sup> See CIRCULAR 14, *supra* note 116.

<sup>120</sup> See *id.*

### Encouragement of Future Creation Must Be Considered in Policy Formation.

Efforts to increase the duration of protection for cultural works must be balanced with public domain interests as well. Wholesale protection of all of the cultural elements of a given community could not only have a severe effect on the scope of works available from the public domain, but could do serious harm to the creation of future works.<sup>121</sup> As Long advocates, “[s]elective use of protection of cultural works that might otherwise be considered part of the public domain, creating a limited *domaine public payant*,<sup>122</sup> should reduce harmful derivation costs by removing only those elements of the nation’s culture from unfettered use which the nation itself believes to be either more vulnerable to de-culturization or more valuable to the maintenance of the country’s cultural heritage.”<sup>123</sup>

#### VI. IN ANY INTELLECTUAL PROPERTY SCHEME PROTECTING INDIGENOUS PEOPLES’ ARTISTIC AND LITERARY WORKS, SPECIAL PROTECTION MUST BE ACCORDED SACRED CULTURAL WORKS

One of the most difficult issues regarding the protection of cultural works of indigenous peoples arises in the context of sacred works. I highlighted some of these issues in the context of the developing body of Aboriginal Australian case law discussed above. Interestingly, these issues have arisen not only in the substantive law but also in the context of civil procedure. For example, in the copyright case *M. & Others*, respect for Aboriginal custom regarding sacred names led the judge to modify court procedure.<sup>124</sup> In that case, the names of five deceased artists whose works were being infringed upon were never spoken during the course of the trial, in accordance with Aboriginal customs concerning proper respect for the artists’ spirits.<sup>125</sup>

It is possible to couple copyright law with other rights in order to adequately protect sacred works. Moral rights, trade secret law, and unfair

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121 Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT’L L. & COM. REG. 229, 270 (1998).

122 A *domaine public payant* is literally a “paying public domain” and is generally understood as a legislative scheme that imposes a fee for the use of works in the public domain when an author cannot be identified. Funds raised as part of this scheme usually go to support arts organizations, and could, in these instances, be directed toward arts or cultural organizations supporting indigenous communities. The idea of using a system of *domaine public payant* to protect copyright issues has been explored by WIPO and UNESCO in the past. See, e.g., Daniel J. Gervais, *Intellectual Property, Traditional Knowledge, and Genetic Resources: A Challenge to the International Intellectual Property System*, in INTERNATIONAL CONFERENCE ON INTELLECTUAL PROPERTY, THE INTERNET, ELECTRONIC COMMERCE, AND TRADITIONAL KNOWLEDGE, [www.wipo.org/ip-conf-bg/en/documents/pdf/sof01\\_3\\_11.pdf](http://www.wipo.org/ip-conf-bg/en/documents/pdf/sof01_3_11.pdf) (organized by WIPO and the National Intellectual Property Association of Bulgaria, Sofia, Bulgaria, May 29-31, 2001).

123 Long, *supra* note 121, at 270.

124 Moran, *supra* note 30, at 110.

125 *Id.*

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competition law provide three sources from which to draw upon for the protection of sacred works.

A. Moral Rights are Granted to the Author of a Work and Protect the Integrity of that Work

Moral rights prohibit the alteration of a work without the author's permission.<sup>126</sup> Moral rights include the rights of divulgation, paternity, and integrity. They also allow artists to protect their work from alteration or denigration.<sup>127</sup> As such, moral rights may be used to preserve the cultural integrity of indigenous works. Formal support for the incorporation of moral rights into domestic intellectual property law is found in the Berne Convention:

Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.<sup>128</sup>

Problems in the application of moral rights to this area include, like copyright, authorship and duration of rights. Like copyright laws, moral rights are founded in Romantic notions of granting authorship rights to individual authors or creators. Where a work has no identifiable creator, however, as suggested with regard to copyright law, it is possible that a designated body could serve as the recipient of moral rights in that work. Secondly, moral rights usually endure only until the death of the author or after a set time period. An indigenous community may want to protect the integrity of a work beyond a limited time, as the community's interest in the work may endure beyond that finite point.

Notably, moral rights have had some success in Europe, but less success in the United States, where they have been incorporated into the Visual Artists' Rights Act.<sup>129</sup> European Community law recognizes an author's personal and property rights in a given work, extended into the international community through the Berne Convention.<sup>130</sup> In France, the

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<sup>126</sup> See Mike Holderness, *Moral Rights and Author's Rights: The Keys to The Information Age*, J. INFO. L. & TECH. 1998(1) (Feb. 27, 1998), at [http://elj.warwick.ac.uk/jilt/infosoc/98\\_1hold/holder.htm](http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/holder.htm).

<sup>127</sup> *Id.*

<sup>128</sup> Berne Convention, *supra* note 35, art. 6bis.

<sup>129</sup> Visual Rights Act, 17 U.S.C. § 106A (2000). For a brief summary, see Richard Dahlson, Visual Artists' Rights Act of 1990 and Droit Moral, at [http://www.jw.com/industries/Entertain\\_Sports/Visual\\_Artists\\_Rights\\_Act.htm](http://www.jw.com/industries/Entertain_Sports/Visual_Artists_Rights_Act.htm).

<sup>130</sup> In response to the Green Paper on Copyright, the National Union of Journalists commented:

[T]he integrity and authenticity of an artist's work is of importance to society as a whole. The enduring value of a piece of writing or a photograph or a design may not be immediately recognized. Unless moral rights are preserved there is a danger that the original work will be



*droit moral* exists in conjunction with property rights. In Germany, an author's personal rights exist in exclusion to all others. Bernard Tavernier, a French filmmaker, insists that his films be shown without commercial breaks, something that his *droit moral* permits him to do.<sup>131</sup> Theoretically, if Tavernier were to distribute his works in jurisdictions that did not honor the moral rights of the creator, arbitrary changes to those works could be made.

Since moral rights are economic only in so far as authors or creators are unwilling for their works to be distributed in markets without them, or to the extent that readers and viewers refuse to accept information without this guarantee of personal authenticity, they have not taken hold as an effective means of intellectual property protection in the United States. As essentially a non-economic right, moral rights have not enjoyed the benefit of enforcement as much as other intellectual property mechanisms within the United States legal system. While moral rights have not enjoyed much success in U.S. jurisprudence, however, they still may be an excellent vehicle for indigenous peoples, in efforts to protect sacred works from alteration by others internationally, in contexts within which economic rights are less important than the integrity of the work itself.

#### B. Trade Secrets Can Serve as an Additional Mechanism to Protect Indigenous Sacred Works

In narrow situations where a given cultural work is sacred; where that sacred work was only revealed to a few initiated members of a particular community; and where the community can argue that the work was acquired through improper means, indigenous peoples may effectively use trade secret law to protect certain culturally significant, sacred works. To prove misappropriation of a trade secret, an indigenous group must prove that: (1) the work constitutes a trade secret; and (2) that it was acquired through improper means.<sup>132</sup> In order for a work to constitute a trade secret, it must be (a) a secret and (b) have economic value.<sup>133</sup> Where a community has taken reasonable measures to protect the information from the general public, it will likely be considered to be secret.<sup>134</sup> It may be more difficult

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modified to make it commercially "successful." Very quickly the vigour and variety of our culture will degenerate into what is merely easy to sell . . . [Secondly t]he constant use and re-use of editorial material, altered, modified, or distorted to suit every conceivable niche in the market, is not a happy prospect. The citizen/consumer in our 'information society' must be able to trust—to rely on—the authenticity of the images and information which are being provided. That trust cannot be located in an anonymous corporation—whether it be the BBC or News International—but in the moral and ethical standards of journalists themselves.

Quoted in Holderness, *supra* note 126.

131 *Id.* (citing personal communication with Director John Crone, 1997).

132 Uniform Trade Secrets Act § 1, 14 U.L.A. 437 (amended 1985).

133 *Id.*

134 *Id.*

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for the indigenous group to demonstrate economic value. It may also be difficult for the community to demonstrate that the work was acquired through improper means, which requires a showing that the exploiter knew or should have known that the work was improperly acquired.<sup>135</sup> In the Aboriginal cases discussed above, for example, the defendants all acquired the works overtly and easily; however, an argument can certainly be made by the indigenous communities in this context that the venues within which the works could be found, and the manner in which they were displayed, contributes to a showing of bad faith.

C. Trademark Law Based on Unfair Competition May Provide a Third Vehicle for the Protection of Sacred Works of Indigenous Peoples

Indigenous peoples may use trademark law to protect against false representations or descriptions related to marketed goods and services. The Lanham Act of the United States, codified in Title 15 of the United States Code, for example, prohibits the unauthorized use in interstate commerce of any "false or misleading description . . . which is likely to cause confusion, or to cause mistake, or to deceive."<sup>136</sup> Unfair competition laws are based on principles of consumer protection and designed to protect both consumers and competitors from the misrepresentation of products in the marketplace.

The Lanham Act is a trademark law that creates a cause of action for individuals or groups. Section 2(a) of the Act effectively precludes the registration of disparaging marks:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it: (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.<sup>137</sup>

The Patent and Trademark Board has found marks unregistrable based on association with particular goods and services, or independently, based exclusively on the mark itself. In some cases, courts have noted the group nature of section 2(a) protection. For example, section 2(a) has been used with some success by Native Americans to challenge the trademark registration of symbols considered to be disparaging to the Native American community.<sup>138</sup> In a 1999 case, *Harjo v. Pro Football, Inc.*,<sup>139</sup> the

<sup>135</sup> *Id.* at §1(2)(i).

<sup>136</sup> 15 U.S.C. § 1125(a)(1)(A) (2000).

<sup>137</sup> *Id.* at § 1052(a).

<sup>138</sup> For an interesting discussion of recent case law, see Bruce C. Kelber, "Scalping the Redskins": Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?, 17 HAMLINE L. REV. 533 (1994).

Trademark Trial and Appeal Board canceled the registration of six Washington Redskins trademarks in response to a challenge by Native American activists who contended that the word "Redskin" was disparaging under Section 2(a).<sup>140</sup>

Trademark law has the advantages of granting collective rights and of providing perpetual protection. However, in order to fall within the umbrella of this form of intellectual property protection, artistic and literary works of indigenous peoples must generally constitute commercial goods or services. Indigenous peoples could therefore prevent the marketing of outside goods as "Aboriginal made" or "Indian made," for example, but could not protect sacred works such as dance, ritual ceremonies, or even sacred texts, not used in interstate commerce.

## VII. CONCLUSION

Many authors who argue for a *sui generis* system for the protection of Traditional Knowledge posit that intellectual property law is an inadequate forum within which to seek such protection because traditional intellectual property law is based on a culturally specific paradigm. The establishment of one international system, or much more likely, multiple national *sui generis* systems, however, would deprive those seeking protection of valuable traditional knowledge and cultural properties of the benefit of the existing body of law, existing mindshare, and cache inherent in the current intellectual property legal regime.

If a particular legal system is found to be inadequate in light of globalization and widespread internationalization of legal regimes, it must expand to accommodate various cultures and interests falling within its gambit. If existing intellectual property laws are found to inadequately ensure the protection of valuable works, inventions, designs, or knowledge, then that system needs to adapt to ensure protection that is both effective and meaningful to the cultures it represents. This reconfiguration would involve an expansion of "properties" to reflect a multicultural concept of ownership. Within the realm of artistic and literary works of indigenous peoples, reconfiguration might lead to incorporation of collective ownership, expansion of originality requirements, and application of limits on the duration of protection in a

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139 Harjo v. Pro Football Inc., 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999).

140 Other interesting applications of Section 2(a) to moral issues and group rights include Bromberg v. Carmel Self Service Inc., 198 U.S.P.Q. 176 (T.T.A.B. 1978), in which two women successfully petitioned the Trademark Trial and Appeal Board to cancel the registration of a restaurant slogan, "Only a Breast in the Mouth is Better than a Leg in the Hand", as being disparaging to women. Another interesting case is Ritchie v. Simpson, 170 F.3d 1092 (1999), where the U.S. Court of Appeals held that a citizen who believed that O.J. Simpson's name was synonymous with murder and spousal abuse had standing to bring a Sec. 2(a) opposition to Mr. Simpson's proposed registration of his name and nicknames, doing away with earlier requirements that a mark be offensive to a large community and that the opposer have a special interest in the matter.

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broader community context. Intellectual property laws must also accommodate the protection of sacred cultural works.

In sum, it is crucial that we insist upon the adaptation and expansion of specific legal requirements to adequately reflect modern needs concerning the protection of Traditional Knowledge of all peoples, including indigenous peoples. To create *sui generis* systems to protect the same subject matter for different actors is merely a misapplication of logic.

A. Intellectual Property Law is a Dynamic Body of Law That Has a History of Adapting to Evolving Conceptions of Works and Their Protectorate

Intellectual property doctrine has a history of adapting to tensions that have been present in its law for a long time and that have gone unrecognized. The adaptations result in new constructs previously thought antithetical to existing intellectual property law. In the United States, trademark dilution is one example. Design patents are another.

Before trademark dilution was an accepted part of trademark law, the *sine qua non* of trademark infringement was the likelihood of confusion. Because trademark law is based on consumer protection law, it was thought that if there was no possibility for the consumer to become confused as to the source of the product, there was no trademark infringement. Theorists began to argue that the value of a trademark was not simply in its source signification function, but also on its "uniqueness and singularity,"<sup>141</sup> and that a mark could be infringed by "the gradual whittling away or dispersion of the identity and hold upon the public mind."<sup>142</sup> Over time, as the debate gained momentum, trademark law as it was known was overhauled, first in a series of state laws on the issue and gradually working up to the federal law governing trademarks, the Lanham Act.<sup>143</sup> Even though a theory of trademark infringement based upon dilution was entirely antithetical to existing trademark law, when it came time to recognize dilution as a cause of action, the law adapted its criteria to accommodate that new aspect of trademark law—even though that aspect directly contradicted the foundations of the old one.

Design patents provide a further example of the historical evolution of intellectual property law to conform to changing conceptions of protectable properties. Traditionally, patent law protected exclusively functional inventions.<sup>144</sup> When industrial designs became seen as part of the body of

141 Frank I. Schecter, *The Rational Basis of Trademark Protection*, 40 HARVARD L. REV. 813, 831 (1927).

142 *Id.* at 825.

143 H.R. REP. NO. 104-374, at 3 (1995), reprinted in 1995 U.S.C.C.A.N. 1029, 1030 ("[A]pproximately twenty-five states have laws that prohibit trademark dilution."); 15 U.S.C. § 1125(c) (2000).

144 For an overview of patent history and development in the United States, see Ladas & Perry, *A Brief History of the Patent Law of the United States*, <http://www.ladas.com/Patents/USPatentHistory.html>.

intangible properties worthy of protection, federal patent law was amended to cover, remarkably, inventions that were not functional.<sup>145</sup> In fact, if a design is functional—that is, capable of being protected by a utility patent—it is not eligible for a design patent.

B. Theorists and Practitioners Must Advocate Conforming the Law to the Needs of a Global Community

Intellectual property laws have been, and continue to be, the most globally accepted system for protecting artistic, literary, and scientific works from exploitation and promoting the creation of those works through the provision of rights. In light of increasing globalization and commodification of content, intellectual property laws are being applied in new ways to new sectors of society. In the process of that application, if specific laws, or assumptions upon which those laws are based, are found to be inadequate, they must change accordingly. Extricating cultural and economic bias from specific legislation is not new, and both theory and practice must step up to that challenge in the intellectual property arena as any other.

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<sup>145</sup> See *id.*